STATE OF MICHIGAN

COURT OF APPEALS

PETER J. BLAKE, PAUL M. BLAKE, BLAKE'S ORCHARD, INC.,

Plaintiffs-Appellants,

v

FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN, and DAN DUNCAN, d/b/a FARM BUREAU INSURANCE,

Defendants-Appellees.

UNPUBLISHED
April 18, 2006

No. 253212
Macomb Circuit Court
LC No. 2002-001722-CK

PETER J. BLAKE, PAUL M. BLAKE, BLAKE'S ORCHARD, INC., BLAKE'S BIG APPLE, INC., BLAKE'S BIG APPLE FARM, INC., and BLAKE'S FARM, INC.,

Plaintiffs-Appellants,

v

MICHIGAN FARM BUREAU and FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN,

Defendants-Appellees.

No. 254367
Macomb Circuit Court
LC No. 2003-004385-NI

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

PER CURIAM.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiffs appeal as of right from the trial court's orders granting summary disposition in favor of defendants. We affirm.[1]

Individual plaintiffs, brothers Peter J. Blake and Paul M. Blake, owned Blake's Orchard, Inc., with their brother Raymond G. Blake, now deceased. The brothers had purchased life insurance to fund a buy/sell agreement involving the business. Specifically, the brothers purchased life insurance policies and designated the beneficiaries as the remaining business partners. In the event of death, the beneficiaries would utilize the life insurance proceeds to purchase the business interest from the surviving spouse, and therefore would not be required to sell the business in the event of a death in the family.

In 1999, the brothers began to evaluate their insurance needs in light of an increase in value of the family business. The brothers consulted with defendant Dan Duncan, an insurance agent with defendant Farm Bureau Insurance Company of Michigan ("company"). Duncan was the brother-in-law of the Blake brothers. Plaintiffs had an existing $300,000 policy with defendant company,[2] and a ten-year $250,000 policy with Jackson National that would expire in the near future. Defendant Duncan recommended a twenty-year life insurance policy from defendant company valued at $500,000. This policy was appealing because it had a premium rate guarantee and a guarantee of renewability. Consequently, this policy was purchased and the policy with Jackson National expired.

Defendant Duncan prepared the decedent's application for life insurance to secure the $500,000 policy. In deposition, Duncan testified that in preparing the application, he had asked decedent questions relevant to the form, and had recorded those answers as given. Defendant Duncan testified that decedent had told him that he was not then taking any medications and was not being treated by a medical doctor. The application prepared by Duncan also indicated decedent had at that time denied any treatment or indication of palpitations, high blood pressure, heart murmur, or other disorder of the heart, denied taking any medication for any reason, and denied being a patient in the last five years of taking any diagnostic tests. The end of the application required a signature affirming that the answers were true and complete; decedent had signed this from thus affirming. The application further provided: "No information acquired by any representative of the Company shall bind the Company, unless it shall have been set out in writing in this application[.]"

Defendant Duncan denied the allegation that he knew the decedent then suffered from any medical ailment other than a heart murmur and denied any additional knowledge regarding

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[1] In Docket No. 253212, plaintiffs moved to amend their complaint to add a claim based on the Michigan Consumers Protection Act (MCPA) and additional parties. The trial court denied the motion. Ultimately, the trial court dismissed plaintiffs' original complaint. Plaintiffs filed a new complaint that added the MCPA claim and parties that the trial court refused to grant in the original complaint. The trial court dismissed this second action, and the dismissal is the subject of Docket No. 254367. By order dated April 22, 2004, we consolidated the claims of appeal.

[2] This policy had increased in value to $420,000, was honored by defendant company, and is not at issue on appeal.

treating physicians or medications. However, defendant Duncan acknowledged that there were errors in the preparation of the application. Defendant Duncan failed to indicate that the $500,000 policy would be replacing another policy and failed to indicate that the decedent had a heart murmur. Plaintiffs also alleged that defendant Duncan knew that decedent had been undergoing treatment with Dr. Joseph Arends; this allegation was based on a joke involving a statement the doctor made which was told at family gatherings.

Irrespective of the information provided to or any omissions by defendant Duncan, the amount of insurance requested triggered additional inquiry by defendant company. A representative of defendant insurance company contacted plaintiffs' business as part of that inquiry. The document prepared as a result of that telephone interview indicates that decedent had stated that he had reviewed all of the questions on the life insurance application and signed the application, had denied taking any medication or being treated for any heart or liver problems, and when asked when he had last seen a doctor and for what reason, the decedent had indicated that it had been over ten years, that he could not recall the doctor's name, and that he was treated for a sore throat. This telephone interview did not end the insurer's inquiry. On December 10, 1999, paramedical examiner Ed Larin conducted a medical evaluation. The evaluation indicates that decedent had denied any chest pain, palpitations, high blood pressure, or disorder of the heart, had denied taking medications or seeking medical care for a condition within the last five years, and had not provided the name and address of a personal physician or the date and reason for the last consultation. As with the insurance application form, decedent had signed the bottom of the medical examination form.

On January 27, 2000, defendant company issued the life insurance policy in the amount of $500,000 with individual plaintiffs as the owners and beneficiaries of the policy. On September 27, 2000, the decedent died from pneumonia, a consequence of anaplastic thyroid cancer. Within ten days of the death, plaintiffs allegedly demanded payment of the policy and provided proof of the death to defendant company through its agent, defendant Duncan. Because the death occurred within two years of issuance of the policy, an investigation ensued. During the course of the investigation, it was learned that the decedent had been treated by Dr. Arends from 1994 to 1999. The decedent had indicated that he was not treated for any type of heart condition, had not taken any diagnostic tests, and was not taking any medications, but the medical documentation from Dr. Arends contradicted those statements. The medical documentation also indicated that decedent had been advised that his alcohol consumption and weight were impacting his health, and that he was advised to maintain a certain weight and consume only non-alcoholic beer. The documentation indicated that, decedent had not followed his doctor's orders. He had been prescribed three medications prior to his death, had taken stress tests, and had been diagnosed with aortic insufficiency and aortic stenosis. In 1997, the decedent had been told that he was a candidate for heart surgery in the next five years based on his lifestyle habits.

In addition to discovering the treatment by Dr. Arends, defendant company also learned that the decedent had applied for life insurance with other companies. The decedent had applied for a $500,000 life insurance policy with Federal Kemper Life Insurance on January 28, 1999. Decedent had indicated on the application for that policy that he was never treated for "chest pain, high blood pressure, stroke, diabetes, cancer; a disease or disorder of the heart, lungs, digestive or genitourninary systems; or a mental or nervous disorder[.]" Decedent had indicated

on that form that he had not been hospitalized, consulted a physician, had blood or other medical tests, or taken any medications in the last five years. The decedent had also sought a $500,000 policy from First Colony Life Insurance Company. On that application, the decedent had stated that if underwriting determined that he could not obtain the lowest rate for the plan of insurance, he would not consider a higher rate. On the application form, the decedent had indicated that he did not have a regular care provider or treatment facility and had never been treated for a heart related disorder and denied taking any medications or having diagnostic tests within the last five years. It was also learned that the decedent had sought insurance through the Internet.

After the investigation, defendant company rescinded the insurance policy and the premium was returned. The rescission was based on the material misrepresentations regarding the status of the decedent's health at the time of application. Plaintiffs filed suit to compel the payment of the policy. Plaintiffs alleged that defendant Duncan knew of the decedent's then ongoing treatment with Dr. Arends and the existence of the heart murmur, and that knowledge was imputed to defendant company based on agency principles. Plaintiffs additionally sought to amend the complaint to allege a violation of the Michigan Consumer Protection Act (MCPA) and add additional corporate entities. The trial court denied the motion to amend the complaint, citing the age of the case, the status of discovery, and the futility of amendment. Plaintiffs did not file an application for leave to appeal from the ruling. Plaintiffs merely filed a new action adding the corporate entities as plaintiffs and alleging an MCPA claim. The MCPA claim was clearly based on the failure to pay the insurance policy addressed in the original complaint.

Defendants moved for summary disposition of the original complaint, alleging that it was appropriate based on the material misrepresentations and omissions in the health information that had been provided by the decedent. It was further asserted that any alleged negligence by defendant Duncan was not the proximate cause of any injury because the decedent had not disclosed his health conditions to two other representatives of defendant company. Plaintiffs opposed the defense motions and moved for summary disposition, asserting that defendants failed to settle the claim within the time prescribed by statute and were therefore estopped from rescinding the policy. The trial court denied plaintiffs' motion for summary disposition and granted defendants' motion for summary disposition. With regard to the MCPA claim filed in the second complaint, the trial court granted the defense motion for summary disposition, noting that the second filing in lieu of filing a claim of appeal was sanctionable.

Plaintiffs first allege that the trial court erred in denying their motion to compel discovery. We disagree. A trial court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). Whether a document is protected by the work-product doctrine presents a question of law that is reviewed de novo on appeal. *Leibel v General Motors Corp*, 250 Mich App 229, 244; 646 NW2d 179 (2002). The premise of the work product doctrine is that "any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation are protected from discovery." *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 637; 591 NW2d 393 (1998). The rule is not limited to materials prepared by an attorney, but may include a party's representative. See MCR 2.302(B)(3)(a). Litigation need not have actually been commenced or be threatened before it may be concluded that materials were prepared in anticipation of litigation. *Leibel, supra* at 245. It is sufficient that the materials were prepared in anticipation of litigation if the possibility of litigation is identifiable based on either the facts of

the situation or the fact that the claims have already arisen. *Id*. The party seeking discovery must present adequate reasons why the work product is subject to discovery, but work product that reveals opinions, judgments, and thought process of counsel receive a high level of protection. *Messenger, supra* at 639. In that case, the party seeking discovery must show extraordinary justification. *Id*.

In the present case, the trial court reviewed the disputed document in camera. After the trial court reviewed the document, it concluded that the document was work product not subject to discovery because the criteria for production had not been satisfied. Plaintiffs conclude that the document was necessary in order to impeach the representative of defendant company. This assertion assumes that the document would have presented impeachment evidence. The trial court made no such finding to support the blanket assertion. Moreover, the in camera document was not submitted under seal in the record to this court. Plaintiffs, as the appellants, had the duty to file a complete record on appeal, and the failure to present record support for a proposition is fatal to a claim. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). Consequently, we cannot conclude that the trial court's decision was erroneous.

Plaintiffs next allege that the trial court erred in denying the motion to amend the complaint to allege a violation of the MCPA. We disagree. The grant or denial of leave to amend a complaint is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). The motion need not be granted where amendment would be futile. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Id*.

In *Zine v Chrysler Corp*, 236 Mich App 261, 270-271; 600 NW22d 384 (1999), this Court set forth an overview of the MCPA:

> The MCPA prohibits the use of unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce. MCL 445.903(1); MSA 19.418(3)(1). It defines the term "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(d); MSA 19.418(2)(D). The intent of the act is "to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes." *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363, 367; 395 NW2d 322 (1986).

In *Slobin v Henry Ford Health Care*, 469 Mich 211, 217-218; 666 NW2d 632 (2003), our Supreme Court held that a claim based on the MCPA failed as a matter of law when the purpose of the litigation was not "primarily for personal, family, or household use" as required by the act. Consequently, medial records that were sought to pursue legal avenues did not fall within the scope of the MCPA. *Id*. Summary disposition in favor of the defense was proper where the plaintiff's purchase of a truck was primarily for business use despite some personal use. *Zine, supra*. Similarly, in *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 84-

85; 592 NW2d 112 (1999), this Court held that the MCPA did not apply to the purchase of electricity for primarily business purposes.[3]

In the present case, plaintiffs allege that the insurance policy at issue was purchased primarily for personal, family, or household purposes. This Court is not bound by the labels that a party assigns to the cause of action because to do so would elevate form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Despite plaintiffs' assertions, the deposition testimony provided in this case clearly established that the insurance policy at issue was purchased to fund a buy/sell agreement involving a business. The fact that the business was family owned does not alter its primary purpose. Under the circumstances, the trial court did not abuse its discretion by denying the motion to amend the complaint because amendment would have been futile. *Weymers, supra*.

Plaintiffs next allege that the trial court erred by denying their motion for summary disposition. We disagree. We review summary disposition decisions de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent, the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

Plaintiffs contends that summary disposition in their favor was proper based on MCL 500.4030 that provides:

> There shall be a provision that when a policy shall become a claim by the death of the insured, settlement shall be made upon receipt of due proof of death, or not later than 2 months after receipt of such proof.

"It is a well-established rule of statutory construction that provisions of a statute must be construed in light of the other provisions of the statute to carry out the apparent purpose of the Legislature." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993). Provisions must be read in the context of the entire statute so as to produce a harmonious whole. *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). MCL 500.4030 appears in chapter 40 of the Michigan Compiled Laws, which governs life insurance policies and annuity contracts. The introductory statute, MCL 500.4000, sets forth its application to life insurance contracts on a variable basis, allowing the insurance commissioner to prescribe modifications and define terms. MCL 500.4000(3)(a)-(c). The insurance commissioner, in conjunction with the industry, may adopt rules and definitions for life insurance on a variable basis. *Id*. Furthermore, MCL 500.4008 provides that: "No policy of life

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[3] Based on our conclusion that the MCPA count fails to state a claim, the trial court's grant of summary disposition in Docket No. 254367 was proper.

insurance shall be issued in this state unless it contains the provisions set forth in sections 4010 and 4036." Examining the statute as a whole reveals that MCL 500.4030 is merely a provision that must be set forth in an insurance policy. However, MCL 500.4030 does not appear to be an enforcement statute. Indeed, there is no penalty set forth for a violation of the statute. Rather, MCL 500.4030 is a basic provision that must be included in a life insurance policy, MCL 500.4008, subject to changes and definitions approved by the commissioner. MCL 500.4000. Based on the plain language of the statute as a whole, *Murphy, supra*, plaintiffs' citation to the statute without more was insufficient to support an entitlement to summary disposition. Accordingly, the trial court did not err by denying plaintiffs' dispositive motion.

Plaintiffs next allege that the trial court erred by granting summary disposition in favor of defendant Duncan. We disagree. Summary disposition decisions are reviewed de novo. *Capuzzi, supra*. The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in support of and in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

To establish a prima facie case of negligence, the plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation, that include cause in fact and legal or proximate cause; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). Duty is any obligation owed to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). In determining whether a legal duty is imposed, this Court must evaluate such factors such as the relationship of the parties, the foreseeability of the harm, the degree of certainty of injury, the closeness of connection between the conduct and the injury, the burden on the defendant, the moral blame attached to the conduct, the policy of preventing future harm, the burdens and consequences of imposing a duty and liability for breach, and the nature of the risk presented. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2000); *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997).

With regard to the question of proximate causation involving the 1999 Farm Bureau policy valued at $500,000, the trial court properly granted summary disposition. Admittedly, the testimony regarding defendant Duncan's knowledge of the health of the decedent was in dispute. However, irrespective of defendant Duncan's knowledge of the medical condition of the decedent, the application filled out by the insurance agent Duncan was not the only form of information provided to defendant company. Rather, the decedent had independently spoken with another agent of defendant during a telephone interview. During that telephone interview, the decedent had failed to disclose his heart condition, his cholesterol level, his high blood pressure, his current treating physician, and his medications. During the paramedical examination by Ed Larrin, decedent again had failed to disclose any negligence or errors in the completion of the application by defendant Duncan, and again, had failed to disclose his then

current state of health and medications. Thus, any negligence in completing the form by defendant Duncan was not the proximate cause of the rescission of the policy.

The trial court did not distinguish between the allegations raised in this count of the complaint. The complaint alleged negligence in preparation of the application for the Farm Bureau policy. It also alleged negligence with regard to the advice to allow the $250,000 Jackson National policy to lapse. Defendant Duncan, however, was not the representative for that policy, and plaintiffs did not contact the representative of Jackson National to consult regarding the maintenance or conversion of the policy after the ten-year period expired. At common law, the insurance agent had a duty to act for the benefit of the insurer. *Harts v Farmers Ins Exchange*, 461 Mich 1, 7; 597 NW2d 47 (1999). An agent of the insurance company has no common law duty to advise the insured or potential insured. *Id*. The general rule is that insurance agents have no duty to advise the insured regarding the adequacy of insurance coverage. *Id*. at 7-8. An agent's job is "to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered." *Id*. at 8. However, the Legislature has long distinguished between insurance agents, who act as essentially order takers, and insurance counselors, who function as advisors. *Id*. at 9. An event may occur that alters the relationship of the insurance agent, who acts as an order taker, and the insured. The alteration of an ordinary relationship between the agent and the insured may be characterized as a special relationship that gives rise to a duty to advise on the part of the agent. *Id*. at 10. The general rule of "no duty changes when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured." *Id*. at 10-11.

After review of the documentary evidence submitted in this case, we conclude that summary disposition was proper based on plaintiff's failure to meet the 2.116(C)(10) opposition standards. Defendant Duncan admitted that, in retrospect, he would not have recommended the lapse of the Jackson National policy. However, the principal reason for his regret was because the policy was a ten-year policy for which the two-year contestability period had passed. Furthermore, the record contains evidence documenting why defendant Duncan recommended the $500,000 twenty-year guaranteed life insurance policy. The premium was guaranteed to be $2300 per year for its entire duration, and it was a conversion policy. If health changes occurred, the policy could be converted to a different type of insurance policy. The exact terms of the Jackson National Policy are not contained within the record. Moreover, defendant Duncan noted that he did not know the terms of the policy because a different agent handled the claim. Thus, there is no indication in the record that defendant Duncan made a misrepresentation with regard to the coverage offered or provided by Jackson National, there is no indication that an ambiguous request regarding this policy was made to defendant Duncan, and there is no indication that defendant Duncan assumed an additional duty with regard to this policy. Thus, three of the four exceptions for imposing a special relationship had not been satisfied. *Harts, supra*.

With regard to the fourth exception, a duty may be based on a special relationship where an inquiry is made that may require advice and the advice is inaccurate. In the present case, there is no indication that the advice given by defendant Duncan was inaccurate; rather it was made without benefit of hindsight that the decedent would die within the two year contestability

provision of the Farm Bureau policy. Based on the record available, the twenty year life insurance policy was a better policy than the Jackson National Policy because of the guaranteed rate and lengthy 20 year period. There was no indication that the Jackson National Policy could have been renewed for the same rate, and no indication that it could be converted to a different policy.

Furthermore, plaintiffs' briefing of the issue does not provide specific information to impose a duty based on a special relationship. Rather, plaintiffs alleged at oral argument in the trial court that it had not yet deposed a standard of care expert regarding any breach by defendant Duncan. However, promises to present factual evidence at trial are insufficient, *Maiden, supra*, and summary disposition is appropriate where further discovery would not create a factual issue. Plaintiffs failed to indicate why an affidavit could not be obtained in lieu of a deposition. Additionally, amendment of the complaint had been denied in part because of the duration of the case and the pending closure of discovery. Consequently, because of the lack of evidence submitted to create a factual issue that would cause defendant Duncan's conduct to fall within one of the special relationship exceptions delineated in *Hartz, supra*, summary disposition was proper with regard to any statements that defendant Duncan made with regard to the Jackson National policy. Plaintiffs could have consulted with the agent for that policy to determine their needs.

Plaintiffs next allege that the trial court erred in granting defendant company's motion for summary disposition. We disagree. The elements of a valid contract are: (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). Plaintiffs asserted that defendant company breached the contract by failing to pay the claim on the life insurance policy of decedent. In response, defendants alleged that the policy was not valid and binding because of material misrepresentations made when completing the policy. "In order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract." *Omnicom v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). With regard to a material breach of an insurance policy warranting rescission, statutory law examines what constitutes a material breach:

> (4) A misrepresentation that an applicant for life, accident or health insurance has not had previous medical treatment, consultation or observation, or has not had previous treatment or care in a hospital or other like institution, shall be deemed, for the purpose of determining its materiality, a misrepresentation that the applicant has not had the disease, ailment or other medical impairment for which such treatment or care was given or which was discovered by any licensed medical practitioner as a result of such consultation or observation. If in any action to rescind any contract or to recover thereon, any misrepresentation is proved by the insurer, and the insured or any other person having or claiming a right under the contract, shall prevent full disclosure and proof of the nature of the medical impairment, the misrepresentation shall be presumed to have been material. [MCL 500.2218.]

Based on this statute, once a misrepresentation is proved by an insurer in an action to recover on a policy or rescind a policy, the insured's prevention of full disclosure and proof of the medical impairment results in the presumption of a material misrepresentation. In this case,

defendant company proved a misrepresentation. It presented the medical records of Dr. Arends and the letters sent by Dr. Arends following each appointment. These records clearly delineated the recent heart problems and medications prescribed. Moreover, the insured himself, the decedent, had prevented full disclosure of the health condition. The decedent had not told his wife or plaintiff brothers about his heart condition or medication. Irrespective of what defendant Duncan knew or when, the decedent had prevented full disclosure of the information by withholding it when the application was completed, during the telephone interview with a representative of defendant insurance company, and during the paramedical examination. Irrespective of the knowledge held by defendant Duncan, it is clear that the decedent himself had precluded full disclosure of the true status of his health. Consequently, the misrepresentation "shall" be presumed to be material. *Neal, supra*.

In spite of the proofs, plaintiffs continue to allege that the knowledge of defendant Duncan as the agent was imputed to defendant company. However, the insurance application at issue expressly provided that: "No information acquired by any representative of the Company shall bind the Company, unless it shall have been set out in writing in this application." The principal determines for itself what authority will be conferred upon an agent, and a clearly delineated power cannot be extended by construction. See *Jeffrey v Hursh*, 49 Mich 31, 32; 12 NW 898 (1882). Because the application expressly provided that information must be disclosed in order to bind the company, plaintiffs' argument is without merit.

Moreover, any allegation that the decedent was still insurable, despite his health conditions, does not prevent rescission of the policy. In *Oade v Jackson National Life Ins Co*, 465 Mich 244, 253-254; 632 NW2d 126 (2001), the Supreme Court rejected the contention that a change in facts was "material" only if the correct information would have caused a complete rejection of the policy. Rather, the Supreme Court concluded that the proper materiality question was not whether *any* policy would have issued, but rather, "whether 'the' contract issued at the specific premium rate agreed upon, would have been issued notwithstanding the misrepresented facts." *Id*. at 254. Therefore, the inaccurate medical history then given by decedent allowed defendant company to rescind the contract, and the trial court properly granted summary disposition.[4]

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

[4] In light of our decision, we need not address plaintiff's claim of error with regard to the trial court's order permitting re-evaluation of the case.